

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Marriage of:)	
)	No. 56498-6-I
RONALD C. GARDNER,)	
)	DIVISION ONE
Respondent,)	
)	
and)	UNPUBLISHED OPINION
)	
UYEN T. LE,)	FILED: September 25, 2006
)	
Appellant.)	
_____)	

AGID, J. – The trial court designated Gardner the primary residential parent with sole decision-making authority for major decisions affecting his and Le’s daughter in the parties’ final parenting plan. Le appeals, assigning error to nearly all the court’s findings of fact and conclusions of law and contending the trial court abused its discretion by relying upon testimony from the parties’ agreed-upon parenting evaluator. She also requests fees on appeal. Trial courts have broad discretion in resolving issues concerning the welfare of children. Given Le’s admitted threats to her child’s life and safety and the testimony of many witnesses about her depression, anxiety and mood disorder, substantial evidence supports the trial court’s order.

While she does not prevail on appeal, RCW 26.09.140 allows us to exercise our discretion based on Le’s financial need. We grant her an award of attorney fees

incurred on appeal in an amount not to exceed \$10,000.

FACTS

Ronald Gardner and Uyen T. Le were married on November 23, 2002, and their daughter T.G. was born on November 6, 2003. On February 6, 2004, the parties separated, and on April 22, 2004, Gardner filed for dissolution. When they separated, the parties agreed Le would be the temporary primary residential parent and established an informal temporary residential schedule that became the substance of a temporary order entered on May 26, 2004. Gardner had significant visitation with the child.

In late October 2004, Gardner sought appointment of a guardian ad litem for T.G. because a conflict arose about his visitation time, Le's anger towards him, and her refusal to follow T.G.'s doctor's recommendations. In December 2004, the parties agreed to use Margo Waldroup as a parenting evaluator. In March 2005, Gardner filed a motion for contempt for Le's continued interference with his residential time under the temporary parenting plan. The parties settled before the motion was heard, and Le agreed to pay Gardner's attorney fees. On April 8, Waldroup completed her parenting evaluation based on home visits, a review of T.G.'s medical records, and interviews with the parties and third parties including the couple's therapist. On May 24, 2005, a four-day trial on the issues of custody and child support began.

Testimony of Margo Waldroup

Waldroup recommended that Gardner be the primary residential parent for T.G. with sole decision-making authority because she believed he was a more

balanced, patient parent who would be more likely to make sound decisions and keep Le informed. She believed Le instigated conflict between the parties and expressed concern about the long term stress T.G. would suffer due to the high degree of hostility Le showed toward Gardner. She observed first-hand Le's interference with Gardner's parenting time and stated Le acted out in emotionally abusive ways and caused the majority of the tension, disruption and strife due to high levels of anger and hostility towards Gardner. She did not believe the pattern of hostility would end if Le became T.G.'s permanent primary residential parent. She stated

[Le] will call and yell and scream at him [Gardner]. She will say things to him like, "Maybe I should just kill [T.G.], she's having such a bad life." And she says things that scare the father like
"Maybe you should just die," or, "Maybe I should just kill you[.]" . . . making those kinds of violent threats, many of them being toward harming the child, and also that she yells at the father during exchanges. She has yelled at the father while breast-feeding the baby. . . .

. . . .
Telling Ron that [T.G.] was dead, that she [T.G.] fell down the stairs.

. . . .
. . . That she should kill herself and [T.G.] rather than have them live in this wretched state of divorce. That [T.G.] looks like Ron and therefore maybe she should hit her and give her something to really cry about.

Waldroup also expressed concern about Le's reaction to medical advice for T.G. and her pattern of conflict with healthcare providers, stating Le's conflict with T.G.'s pediatricians was not in T.G.'s best interests because there was no continuity of care at a time when they were monitoring for renal and eating problems.

After Waldroup completed her observations of both parents, she testified that psychological tests were administered to both parties by Dr. Marsha Hendrick, a

licensed psychologist. Le objected on the ground Waldroup was not qualified to interpret MMPI data.¹ But the court accepted Waldroup's testimony based on her observations of Le, the court's prior acceptance of MMPI tests, and Waldroup's testimony she had used these tests in 200 prior parenting evaluations presented to King County Superior Courts. Based on her observations, Waldroup believed Le possessed:

sensitivity to criticism, [a] tendency to overact with anger and hostility, [she was] apt to be guarded and suspicious, . . . feel victimized, blame is apt to be projected outward, [she was] argumentative, [characterized by] rigidity, [had a] tendency to brood, ha[d] difficulty maintaining intimate relationships because . . . [she became] unreasonably jealous and retaliatory in dealing with others. [She had d]ifficulty managing impulses, immature demands, emotional outbursts, [and] manipulative personal behavior.^[2]

Testimony of Dr. Joanne Solchany

Dr. Solchany, a registered psychiatric nurse practitioner with a Ph.D. in nursing, testified about attachment between babies and their parents and T.G.'s attachment to Le based on observations in Le's home. According to Solchany, Le practiced attachment parenting, a style of parenting that involves co-sleeping, responding to cries within several seconds, and extended breastfeeding. She testified anger and hostility could be harmful to a child and result in stress and confusion, but had not observed hostility or anger from Le. She believed placement with Le would be in T.G.'s best interests, but admitted she had not observed Gardner's parenting during her

¹ To refute Waldroup's testimony, Le called Dr. L. Tien, Director of Programs and Psychology at Antioch College, who testified Hendrick's tests were not administered according to established guidelines and were not appropriate because Le did not speak English as her native language. Tien stated cross-cultural misunderstanding could explain Waldroup's conclusions regarding Le's incidents of anger, hostility, yelling, and threatening behavior.

² Jimmy Wanichuksombat, Le's former boyfriend, testified he did not notice any impulse control or other emotional abuse problems during the time he spent with her.

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evaluation.

Testimony of Dr. Quinn

Dr. Hal Quinn, T.G.'s pediatrician, believed Le was able to follow through with medical appointments and procedures for T.G. based on the eight examinations of T.G. he conducted from the beginning of 2005 to the time of trial. Quinn stated T.G. was within the normal weight range, but her disordered eating could have been caused by Le's anxiety and the existing family conflict. He believed Le's history as a Vietnamese refugee who had witnessed malnourishment firsthand could cause her high level of anxiety about her child. He believed Le was a caring mom who loved her child, but her continued anxiety could cause other problems with T.G.'s growth. He also believed Gardner to be a good, concerned parent.

Testimony of Dr. Leslie Butterfield

Dr. Leslie Butterfield, a clinical psychologist specializing in postpartum mothers and their children, diagnosed Le with major situational depression, probably caused by the divorce, and an adjustment disorder with depression and anxiety characterized by mood disturbances, based on approximately 20 observations of Le and T.G. between November 2004 and the time of trial. Based on these observations, he believed Le was a responsive mother who exhibited a normal mother-child interaction. He stated he did not observe Le speaking ill of Gardner in T.G.'s presence. He declined to offer an opinion on the issue of parenting because it was outside the scope of his training.

Testimony of Ronald Gardner

Gardner stated Le threatened to kill herself and T.G., told him T.G. would not live to age five, and threatened to drop and hit T.G. But he had no knowledge that Le

had actually hit the child. He testified Le hit him with an open hand on the back of his head on one occasion as he was placing T.G. in a car seat and threatened to kill him after the couple attended mediation.

Gardner said Le interfered with his visitation time, and he preferred to exchange T.G. with Le in a well-lit public area because she made a false domestic violence charge against him. But Le refused to allow visitation unless he exchanged the child at Le's home. He stated his visitation time was hindered even after he resumed the exchanges at Le's home when, for example, Le would call him and insist that he return the child before the visitation time ended so she could breast-feed T.G.

He testified Le disregarded the advice of T.G.'s pediatrician by failing to take the child to the dentist when she turned 12 months old. She refused to follow the advice of doctors about tooth care, particularly at night. As a result of Le's disregard for medical advice, T.G.'s teeth had decayed. On one occasion he said Le refused to apply a tooth gel to protect T.G.'s teeth, which he interpreted as "lashing out" against him.³

Testimony of Uyen T. Le

Le testified she deeply loved her child and was distraught about her divorce because it conflicted with her Vietnamese cultural values. She admitted to threatening to drop T.G. on the ground because she was frustrated with Gardner but said she had

³ Marianne Bond, a friend of Gardner's since 1982, testified she observed Gardner as a parent five times and visited Gardner and Le's home shortly after T.G. was born. She also observed Gardner with her own children, ages 12 and 14, and would have no problem leaving her children with Gardner. Gary Trabolsi, a friend of Gardner's since 1983, also testified he knew Gardner as a tolerant, patient, fun, bright and loving person who was good with children, including his own daughter. He observed Gardner with T.G. six or seven times and believed Gardner loved T.G. and would do whatever was necessary to be a good parent if he became the primary residential parent.

no intention of throwing T.G. on the ground. She admitted telling Gardner T.G. died in a fall down the stairs and threatening to kill herself and the child. She said she wanted to see how Gardner would react and express her unhappiness about the divorce. She denied ever having hit T.G.

Le testified about breast-feeding T.G. in the mornings, afternoon and evenings. She stated she tried numerous techniques to make sure she ingested the proper number of calories each day and was greatly concerned about T.G. because she was her first baby.⁴ She admitted changing doctors five times in order to find a doctor who would agree with her style of parenting. She denied interfering with Gardner's visitation schedule, explaining her preference for visits at her home because of the child's attachment to her and her breastfeeding schedule. She also stated she insisted on exchanging T.G. in her home because she did not want to wait in the rain when Gardner was late picking T.G. up.

Final Parenting Plan

After trial, the court designated Gardner the primary residential parent with sole decision-making authority for major decisions. The court explained its decision in the Final Parenting Plan as follows:

2.2 OTHER FACTORS (RCW 26.09.191(3)).

The mother's involvement or conduct may have an effect on the child's best interest because of the existence of the factors which follow:

The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological

⁴ Kay Batt, a certified lactation consultant with the La Leche League, testified about commonly held beliefs and benefits of breastfeeding and her observations of Le with the child. She believed Le was a responsive and attentive mother. T.G.'s nanny, Hai Vu, testified about Le's breastfeeding schedule, T.G.'s preference for her mother over her father, and that T.G. ate solid food and drank fluids other than breast-milk.

development.

Failure to follow medical advice. [L]ong term emotional impairment which interferes with parent's performance of parenting functions.

....

3.1A To allow a cooling-off period and adjustment of child, mother shall have no contact with the child from 6/3/05 – 6/9/05.

Le declined to sign the final parenting plan but was present in court for the ruling. On June 24, 2005, the court denied Le's motion for a new trial.

On July 26, 2005, the court entered findings of fact and conclusions of law, adopted the Final Parenting Plan, and ordered Gardner to pay \$20,000 of Le's attorney fees.⁵ Le appeals the Final Parenting Plan, the trial court's denial of her motion for a

⁵ The trial court's findings included the following:

[T]he mother suffers from a long term emotional impairment that seriously interferes with her performance of parenting functions as defined in RCW 26.09.004 and the Court further finds that the mother has engaged and continues at present to engage in the abusive use of conflict which creates a danger of serious damage to the child's psychological development.

The mother exhibits behavior and thoughts that are bizarre including, but not limited to, threatening harm to the child to manipulate the father, threatening harm to the father, threatening harm to herself, stating to the father that the child is dead, screaming at the father while breastfeeding the child, and slapping the father in the presence of the child. Threatening to kill the child and herself.

The Court further finds that the mother's judgment is grossly impaired and she is unable to distinguish fiction from reality with respect to the child's weight loss. . . . The mother has been in conflict with most of the professionals she has dealt with including firing four of the child's pediatricians, getting into an argument with a nurse, changing her lawyers four times during the dissolution proceedings and creating conflict with the child's nanny causing the nanny to quit temporarily. The mother's poor judgment and lack of impulse control continues to be present. The mother failed to tell Dr. Quinn she was working with another professional Dr. Solchany on child's eating issues, another example of her extreme mistrust and suspicion as to professionals.

The Court further finds the mother has consistently interfered with the father's parenting time. The father has been consistent and steady in exercising his parenting time.

The Court further finds the mother incapable of consulting with the father and making mutual decisions about the child and the mother's judgment is grossly impaired.

The Court further finds the father's testimony was credible in all regards in this case and the father has a better potential for future parenting of the child.

new trial and the court's findings of fact and conclusions of law.

DISCUSSION

Custody Award

Le asserts a number of errors of law, abuses of discretion, and challenges all the court's findings of fact and nearly all the conclusions of law. None of her arguments is persuasive. She asserts the court failed to consider the totality of the evidence presented about her capabilities as a parent and relied too heavily on the testimony of parenting evaluator Margo Waldroup. She asserts Waldroup was not competent to testify about her mental health, and the court erred by allowing Waldroup's testimony about any alleged emotional impairment affecting her parenting performance.⁶ She argues there was insufficient evidence to support the court's finding that she suffered from a long term emotional impairment, she was unable to tell fiction from reality concerning her child's weight loss, and exhibited bizarre behavior and thoughts. She asserts the testimony of T.G.'s pediatrician supports her concern for her child's weight because the doctor diagnosed T.G. with an eating disorder. She contends her threats to Gardner, T.G. and her own life were not real and did not affect her child. And she argues the court abused its discretion by relying on Waldroup's report to conclude she was engaged in the abusive use of conflict because the conflict that existed was

The Court finds that the factors under RCW 26.09.191(3)(b) and (e) outweigh all factors under RCW 26.09.187 in favor of placing primary residential care with the father regarding the child.

The Court finds the mother's gross impairment of judgment and inability to consult with the father requires that sole decision making be placed with the father.

The Court adopts as the Final Parenting Plan the plan proposed by the father with written modifications and/or addition by the Court.

⁶ She also asserts error because the psychological tests Waldroup hired Hendrick to administer did not meet the requirements for a valid diagnosis and the questions were not normed for Vietnamese Americans.

between herself and Gardner and the report was improperly grounded in the friendly parent concept.

Gardner asserts the court based its decisions on the evidence as a whole and contends substantial evidence supports the court's finding that he has better potential for future parenting. He argues Le's threats to kill him, herself, and T.G. in order to get his attention are bizarre behaviors that pose a significant threat to T.G.'s long term development. He asserts Le's history of conflict with T.G.'s pediatricians when T.G. faced renal and dietary problems evinces a substantial risk to the child's welfare. And he contends Le's interference with his parenting time and her abusive use of conflict, sometimes in the presence of T.G., posed a significant risk of harm to T.G. and demonstrated her inability to cooperate with him as a parent.

Appellate courts review final parenting plans for abuse of discretion and are reluctant to disturb child placement decisions.⁷ A trial court abuses its discretion when "its decision is based on untenable grounds or reasons, or is manifestly unreasonable."⁸ Appellate courts will not retry the facts on appeal, but will accept findings of fact as verities if they are supported by substantial evidence in the record.⁹ Evidence is substantial when there is a sufficient quantum of evidence "to persuade a fair-minded person of the truth of the declared premise."¹⁰

⁷ In re Marriage of Mansour, 126 Wn. App. 1, 106 P.3d 768 (2004); In re Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001); see also In re Marriage of Cabalquinto, 100 Wn.2d 325, 327, 669 P.2d 886 (1983) (trial courts have broad discretion in matters dealing with the welfare of children).

⁸ Mansour, 126 Wn. App. at 8 (quoting In re Marriage of Wicklund, 84 Wn. App. 763, 770 n.1, 932 P.2d 652 (1996) (internal citations omitted)).

⁹ In re Marriage of Thomas, 63 Wn. App. 658, 660, 821 P.2d 1227 (1991).

¹⁰ In re Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), review denied, 149 Wn.2d. 1007 (2003).

When making residential placement decisions, trial courts analyze the factors under RCW 26.09.187(3), which provides in pertinent part:

- (i) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parental functions;
- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
-
- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

The first factor under RCW 26.09.187(3) should be given greatest weight, but this does not create a presumption in favor of the primary caregiver.¹¹ RCW 26.09.187(3)(a)¹² must be read together with RCW 26.09.191.¹³ Under RCW 26.09.191(3), the trial court

¹¹ In re Marriage of Kovacs, 121 Wn.2d 795, 809, 854 P.2d 629 (1993) (rejecting a presumption in favor of primary caregiving parents).

¹² RCW 26.09.187(3)(a) provides:

The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191 are not dispositive of the child's residential schedule, the court shall consider the following factors[.]

¹³ In re Marriage of Katare, 125 Wn. App. 813, 823-24, 105 P.3d 44 (2004), review denied 155 Wn.2d 1005 (2005); RCW 26.09.191 provides in pertinent part:

(3) A parent's involvement or conduct may have an adverse affect on the child's best interests, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

....

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in RCW 26.09.004;

....

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

may impose dispute resolution and decision-making provisions that are in the best interests of the child.¹⁴

Substantial evidence supports the trial court's findings in this case. Nothing in the record suggests the court failed to consider the evidence as a whole. Over the course of four days, both parties presented evidence and the court analyzed the parents past and potential future parenting skills. While Le presented evidence that she was actively breastfeeding T.G. and had taken primary responsibility for T.G.'s daily needs, the court could not automatically favor her as the primary caregiver.¹⁵ The trial court was required to consider evidence presented by both parties, including testimony by Le, Waldroup, and Gardner that Le (1) threatened suicide and the lives of T.G. and Gardner, (2) told Gardner T.G. was dead, and (3) threatened to drop and hit T.G. These threats to the child's life and safety are sufficient to establish a gross impairment in Le's judgment and support the court's decision to select Gardner as the primary residential parent with sole decision-making authority.

Le offered evidence to refute Gardner's assertions, including the testimony of T.G.'s nanny Vu, her former boyfriend Jimmy Wanichuksombat, Kay Batt, and Dr.'s Quinn and Solchany. Both parties offered expert testimony as well. Contrary to Le's

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

(4) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

(5) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.

¹⁴ Katare, 125 Wn. App. at 826.

¹⁵ Kovacs, 121 Wn.2d at 809 (rejecting a presumption in favor of primary caregiving parents); RCW 26.09.187(3) reads: ". . . [f]actor (i) shall be given the greatest weight."

contention, Waldroup did not provide expert analysis of the psychological tests given to Gardner and Le. Rather, she based her testimony on her own observations and provided an opinion based on expertise developed from her participation in more than 200 cases in King County Superior Court. Le presented Dr. Tien to refute Waldroup's testimony and offered other evidence to refute Gardner and Waldroup's contentions. But Le's own experts, Dr.'s Butterfield and Quinn, testified to Le's high level of anxiety and mood disturbances. And Quinn stated the conflict in the home could have caused T.G.'s eating difficulties and could affect the child's growth. Regardless of Le's intentions when she threatened her child's life, whether the threats were short term in nature or intended to punish Gardner, the trial court had sufficient evidence to find that Le suffered from long term emotional impairment and her behavior posed a serious danger to T.G.'s psychological development.

We defer to the trier of fact on issues of credibility and the weight to be given conflicting testimony.¹⁶ Here, the court was well within its discretion to weigh the testimony presented at trial and determine that Le's behavior was sufficiently disturbing to find her emotionally impaired.¹⁷ Under the plain language of RCW 26.09.187(3), a child's residential placement may be limited or precluded if the factors outlined in RCW 26.09.191 result in a finding that a parent's conduct or involvement will have an adverse affect on the child's best interests. Given the threat of harm to T.G. and the testimony of witnesses on both sides, the court correctly held that RCW 26.09.187 was outweighed by the factors it found under RCW 26.09.191(3). These findings, together

¹⁶ Burrill, 113 Wn. App. at 868.

¹⁷ Id.; In re Marriage of Woffinden, 33 Wn. App. 326, 330, 654 P.2d 1219 (1982), review denied, 99 Wn.2d 1001 (1983).

with the unrefuted evidence of conflict between Le and Gardner, support the court's decision to place T.G. with Gardner as the primary residential parent with sole decision-making authority on major decisions.

ATTORNEY FEES

Le seeks legal fees on appeal under RAP 18.1 based on her inability to pay and submitted a financial affidavit to demonstrate this need.¹⁸ Gardner argues Le failed to sufficiently argue why fees should be awarded in her opening brief and asks the court to exercise its discretion and deny her request. He argues Le is able to pay because she is a stockbroker with Smith Barney and she testified at trial she could return to full-time employment if she so chose.¹⁹

Under RAP 18.1, we may award attorney fees "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, before either the Court of Appeals or Supreme Court" Under RCW 26.09.140 we may award fees to a party based on financial need whether or not that party prevails. While Le does not prevail in this appeal, RCW 26.09.140 allows us to exercise our discretion based on Le's financial need. Based on Le's affidavit, we award her \$10,000.00 for

¹⁸ She states her gross income was \$68,249 in 2004, \$35,193 in 2005, and her total earnings for 2006 were \$17,665. In addition to her legal fees, she states that she owes \$20,200 in credit card debts in addition to other debts owed to her family. By contrast, she asserts Gardner is able to pay her attorney fees on appeal because his gross monthly income in 2004 was \$19,760 and asks the panel to award her attorney fees on appeal because the trial court awarded her trial fees based on her lack of income and Gardner's ability to pay.

¹⁹ Gardner also filed a motion to strike a Supplemental Financial Affidavit submitted by Le on the ground it contained improper substantive argument and failed to conform to the requirements of RAP 18.1. The argument is not relevant to our decision, so we deny the motion to strike.

fees she has incurred on appeal.

We affirm the trial court.

Ajid, J.

WE CONCUR:

Becker, J.

Grosse, J